Held: (1) the operative words in each bill are "D/A" which mean "documents released against acceptance" therefore the defence contention that payment was conditional "on arrival of the steamer" failed;

(2) in this case the acceptance by the defendants of the documents bound them to pay.

Case referred to:-

(1) *Cossey* v. *McManus* (1919), 52 N.S.R. 235 (Canadian).

CIVIL SUIT.

Lim Kean Siew for the plaintiffs.

V. K. Palasuntharam for the defendants.

Cur. Adv. Vult.

Ong Hock Sim J.: The plaintiffs claim against the defendants as acceptors of:—

(1) Bill of Exchange No. 22396 for £2,200.0.0. (equivalent to M$18,857.14) with interest at 5% per annum from 29.5.63 to date of writ, now overdue and unpaid, dated the 5th day of March 1963 drawn by the plaintiffs upon the defendants payable at 60 days sight D/A on arrival of steamer to the order of Amsterdamsche Bank N.V. (the plaintiffs' bankers) which said bill was delivered by the plaintiffs to the said bank who upon same being dishonoured returned it to the plaintiffs.

(2) Bill of Exchange No. 22607 for £2,375.0.0. (equivalent to M$20,357.14) with interest at 5% per annum from 24.6.63 to date of writ, now overdue and unpaid, dated the 4th day of April, 1963 drawn by the plaintiffs upon the defendants payable at 60 days sight D/A on arrival of steamer to the order of Amsterdamsche Bank N.V. (the plaintiffs' bankers) which said bill was delivered by the plaintiffs to the said bank who upon same being dishonoured returned it to the plaintiffs.

(3) Bill of Exchange No. 22650 for £3,562.10.0. (equivalent to M$30,536.00) with interest at 5% per annum from 4.7.63 to date of writ, now overdue and unpaid, dated the 10th day of April, 1963 drawn by the plaintiffs upon the defendants payable at 60 days sight D/A on arrival of steamer to the order of Amsterdamsche Bank N.V. (the plaintiffs' bankers) which said bill was delivered by the plaintiffs to the said bank who upon same being dishonoured returned it to the plaintiffs.

The total of the three bills amounts to $69,750.28 which the plaintiffs claim in this action with interest at the rate of 5% per annum from date of writ until payment.

In their defence, the defendants admit that they had signified acceptance of all three bills but contend each of the three documents having been drawn and expressed "At 60 days sight D/A, on arrival of steamer, *pay this first of exchange... to the order of* Amsterdamsche Bank N.V. Bijbank Rotterdam ... for collection" the said documents were not an unconditional order to pay on demand or at a fixed or determinable future time but were expressed to be payable on a contingency and were therefore not bills of exchange. The defendants admit that the plaintiffs had made a demand for payment on the 9th September, 1963 and further admit that neither of the two partners of the defendant firm had paid the sums demanded on the said three documents or any of them.

Evidence was given on behalf of the plaintiffs by an assistant in the Mercantile Bank in charge of the bills section and an officer in the bills section of the Hongkong & Shanghai Bank and I accept their evidence that the operative words are "D/A" which means "documents released against acceptance" and accordingly I disagree with the defence contention that payment was conditional "on arrival of the steamer", which is the first limb of the defence. On the second limb defence counsel submitted that "even if it is a bill, the defendants had asserted that the sum was not payable to the plaintiffs as it has not been endorsed in favour of the plaintiffs." This was not raised in the defence which had admitted that the defendants had signified acceptance and it seemed clear that the defence is bound by the pleadings. The case of *Cossey* v. *McManus*[1] is authority, if this were necessary, for saying that endorsement was not required to entitle action by the drawer. It ruled that by the mere fact of acceptance an undertaking by the acceptors to pay the bill according to its tenor was implied, which was enforceable by the holder though it had not been endorsed.

On the pleadings therefore the plaintiffs are entitled to judgment and the matters raised at the hearing on behalf of the defence would appear to seek to confuse the issue before the court, that the acceptance by the defendants of the documents bound them to pay. There will therefore be judgment with costs for the plaintiffs for the sum claimed with interest at the rate of 5% per annum from the date of the writ to date of payment.

Judgment for the plaintiffs.

Solicitors: *Lim Kean Siew & Co.; V. K. Palasuntharam.*

GAN POH v. UNION OMNIBUS CO. LTD.

[F.C. (Ong C.J. (Malaya), Gill & Ali F.JJ.) December 9, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 60 of 1969]

Master and Servant — Claim for damages for injuries sustained in course of employment — Alleged breach of statutory duty by employer — Negligence of employer — Workmen's compensation — Whether injury caused by accident arising out of employment — Workmen's Compensation Ordinance, 1952, ss. 4, 8 & 41 (2).

The plaintiff in this case was a bus conductor employed by the respondents. He was suffering from a heart disease and suffered a stroke while working. It was alleged that the respondents were in breach of their statutory duty in requiring the plaintiff to work for more than 6 days and more than 48 hours in a week in contravention of the provisions of sections 58 and 59 respectively of the Employment Ordinance, 1955. The learned trial judge ([1969] 1 M.L.J. 186) dismissed the claim as he held that the plaintiff had failed to show that the injuries sustained by him were due to the fault of the respondents and he also refused to award compensation under the Workmen's Compensation Ordinance, 1952. The plaintiff appealed. He died before the appeal came on for hearing, and the appeal was prosecuted by his widow.

Held: (1) the learned trial judge was correct in dismissing the plaintiff's claim on the grounds of breach of statutory duty and of negligence;

(2) in this case the contributory cause of the stroke suffered by the plaintiff was furnished by and in the course of the plaintiff's employment and therefore the appellant was entitled to a compensation under the Workmen's Compensation Ordinance and it was within the competence of the court to make an award under section 41 (2) of that Ordinance.

Cases referred to:-

(1) *Harrison* v. *Wythemoor Colliery Co. Ltd.* [1922] 2 K.B. 674, 686.

(2) *Golden Hope Rubber Estate Ltd.* v. *Muniammah & Ors.* [1965] 1 M.L.J. 5.

(3) *Ormond* v. *C.D. Holmes & Co. Ltd.* [1937] 2 All E.R. 795, 801.

(4) *Darling Island Stevedoring & Lighterage Co. Ltd.* v. *Hankinson* (1967), 117 C.L.R. 19, 34; 40 A.L.J.R. 544; [1967] A.L.R. 545.

(5) *Tan Chye Choo* v. *Chong Kew Moi* [1966] 2 M.L.J. 4; [1970] 1 M.L.J. 1, P.C.

FEDERAL COURT.

Atma Singh Gill for the appellant.

N. A. Marjoribanks for the respondents.

Cur. Adv. Vult.

Gill F.J.: The plaintiff-appellant in this case was employed as a bus conductor by the defendants-respondents from 1st April, 1947. At all material times his wages were $8 per day, and his usual hours of work were from 6.30 a.m. to 6 p.m. His duties, apart from selling tickets to passengers, keeping and maintaining records of tickets sold and accounting for the fares collected, were to look after the safety of passengers when boarding or alighting from the bus and to load on to the roof of the bus and unload therefrom passengers' luggage, vegetable baskets and bicycles, etc.

On 10th April 1965 the plaintiff reported for work at Bahau at 8.30 a.m. The bus on which he worked made a trip from Bahau to Seremban. On its return from Seremban it stopped at Kuala Pilah where the plaintiff had to unload some luggage. After it had proceeded towards Bahau and travelled about four miles from Kuala Pilah the plaintiff felt giddy. A little while later the bus stopped to let down some passengers, and the plaintiff had to unload some bags from the bus. At this stage he vomitted but remained seated in the bus. After the bus had moved and gone for a short distance he had a stroke as a result of which he suffered paralysis of the left half of his body.

On 15th June 1967 the plaintiff issued against the defendants a writ which was indorsed with a claim for "damages for personal injuries sustained on 10.4.65 while the plaintiff was employed as a bus conductor and caused by the negligence and breach of statutory duty of the defendants, their servants or agents". On his claim being dismissed by a judgment of Abdul Hamid J. dated 29th January 1969, the plaintiff commenced this appeal from that judgment. Because of his death shortly before the appeal first came up for hearing, it has been prosecuted by his widow Gan Poh.

The basis of the plaintiff's claim for damages on the ground of breach of statutory duty was that he was required to work for more than six days and for more than 48 hours in a week in contravention of sections 58 and 59 respectively of the Employment Ordinance No. 38 of 1955, it being clear that he was a labourer within the meaning of section 2 of the Ordinance read in conjunction with paragraph 2 of the First Schedule thereto.

The defendants by their defence pleaded that the plaintiff was required to undertake two round-trips per day from Bahau to Seremban, that regular rest periods were provided during the trips and that this arrangement had the full cognizance and consent of the Labour Department. They further pleaded that they did not insist on the plaintiff working more than six days in a week, and that on a prior application being made he was allowed to take a day's holiday at times convenient or suitable.

Admittedly, the plaintiff worked for more than six days and 48 hours in a week, but he received payment for working overtime, and he took unpaid leave off and on. As he was paid by the day, it was obviously to his advantage to work as many days in the month as he liked. Counsel for the defendants submitted that there was no breach of any statutory duty on the part of the defendants, as sections 58 and 59 of the Employment Ordinance did not prohibit a labourer from working more than six days or more than 48 hours a week. It is reasonable to assume that working for more than the number of days or hours in a week, as stipulated in the Ordinance, was entirely a voluntary act on the part of the plaintiff. In the circumstances, the learned trial judge was quite right in coming to the conclusion that there was no breach of statutory duty on the part of the employer. His reason for coming to that conclusion, with which I entirely agree, are stated in his judgment as follows:-

"In my view an employer owes no duty to prohibit a labourer if he so elects to work more than six days in a week. It seems to me that section 59(1) of the Employment Ordinance also places no absolute limitation on the part of the labourer to work more than 48 hours in a week and there appears to be no prohibition against an employer to employ a labourer who voluntarily elects to work more than 48 hours a week.

The plaintiff's claim for damages on the ground of negligence at common law was founded on the allegations that both on 9th April and 10th April, 1965 he was obliged to work when he was feeling ill, because his application for leave was refused on the ground that there was no relief conductor available. To put it in other words, his allegation was that he had to work under stress by reason of the defendant's negligence in refusing his application for sick leave, and that it was this stress which brought about the stroke. The defendants by their defence denied the allegations in the plaintiff's statement of claim that the plaintiff applied for leave either on 9th April or 10th April and that there were no relief conductors available.

The plaintiff's evidence in court was that he asked for leave from one Mr. Lee on 9th April, 1965 at about 11 a.m. after he had already started working, but that he did not ask for leave on 10th April, as he was told in the morning that there was no relief conductor available. The evidence of Mr. Lee Khong Boo (D.W. 2) was that the plaintiff did not complain to him on 9th April, 1965 that he had giddiness or headache or was feeling unwell and did not ask for leave, nor did he ask for leave on 10th April, 1965. The judge's

finding on that evidence is set out in the following paragraph in his judgment: -

"I have considered the evidence of the various witnesses on this point and, in the light of the evidence as a whole, I am inclined to accept the evidence of the plaintiff that he had applied for leave on the 9th of April, 1965. However, I am not satisfied on the balance of probabilities that the plaintiff did in fact apply for leave on the 10th. It is probable that, having been refused leave on the 9th, the plaintiff did not think it worthwhile to ask for leave on the 10th. In any event I think there was ample justification on the part of the defendants' supervisor in this case to refuse leave without the plaintiff producing any medical certificate. Even assuming that the plaintiff did in fact ask for leave on the 10th and that the defendants' supervisor refused leave he could not under the circumstances as a reasonable and prudent person have known that there was a risk of exposing the plaintiff to having a stroke."

In the result, the judge came to the conclusion that the plaintiff had failed to show that the injuries sustained by him were due to the fault of the defendants.

The judge's finding of fact on the question as to whether or not the plaintiff had applied for leave and whether or not it was refused, has not been seriously challenged in this court, nor do I see how it can possibly be challenged even if one were to accept the evidence of the plaintiff *in toto*. On that finding of fact it was obvious that no negligence had been established against the defendants. Consequently, the judge was quite right in dismissing the plaintiff's claim for damages on the ground of negligence. I would therefore dismiss this appeal in so far as the plaintiff's claim on the grounds of breach of statutory duty and negligence was concerned.

There is, however, a ground of appeal to the effect that if the judge was correct in dismissing the plaintiff's claim he ought to have invoked the provisions of subsection (2) of section 41 of the Workmen's Compensation Ordinance, 1952 and proceeded to make an award under section 8(b)(ii) and 8(b)(iii) of the Ordinance. Section 41(2) of the Ordinance reads as follows: -

"41 (2) If a suit is instituted in any court to recover damages independently of this Ordinance for injury caused by any accident, and it is determined in such suit or on appeal that the injury is one for which the employer is not liable in such suit, but that he would have been liable to pay compensation under the provisions of this Ordinance, the suit shall be dismissed; but the trial court, or if the determination is given on appeal, the appellate court shall, if the workman so choose, proceed to assess such compensation, but may deduct therefrom all or part of the costs which, in its judgment, have been caused by the workman instituting the suit instead of proceeding under this Ordinance; and in any proceedings under this sub-section, when the trial court or appellate court assesses the compensation, it shall give a certificate of the compensation it has awarded and the direction it has given (if any) as to the deduction of costs and such certificate shall have the force and effect of an Arbitrator's order."

It was submitted by counsel for the respondents on the authority of *Harrison* v. *Wythemoor Colliery Company, Limited*[1] that this court cannot proceed to award compensation under section 41(2) of the Ordinance, unless an application for it was made to the trial court and refused. Although there is nothing on the record to that effect, counsel for the appellant informed the court from the bar that he did in fact draw the attention of the trial judge to section 41(2) of the Ordinance as soon as the claim was dismissed, that the judge said he was aware of that section but that in his opinion no award for compensation could be made thereunder. Counsel for the respondents said that he was not present when the trial judge delivered judgment, but that in the letter which he received from the appellant's counsel after judgment had been delivered there was mention of the fact that the trial judge's attention had been drawn to this provision in the Ordinance. In the circumstances, I am of the opinion that this court should proceed to deal with this last ground of appeal on the basis that there is in effect an appeal against the trial judge's refusal to act under the provisions of section 41(2) of the Ordinance or against his finding on the evidence that the plaintiff was not entitled to any compensation. That the learned trial judge had the question of compensation in mind is clearly indicated from the following passage in his judgment: -

"In my considered opinion, having regard to the circumstances of this case and in particular the medical evidence, the injury suffered by the plaintiff could not in all probabilities be said to be caused by an accident arising out of and in the course of the plaintiff's employment."

The liability of an employer to pay compensation under the Workmen's Compensation Ordinance is laid down in section 4(1)(a) which reads as follows: -

"4 (1) (a) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, save as hereinafter provided, be liable to pay compensation and any expenses incurred in the treatment and rehabilitation of such workman under section 15 in accordance with the provisions of this Ordinance."

This section must be read in conjunction with section 4(1)(d) which reads as follows: -

"4 (1) (d) An accident happening to a workman shall be deemed to arise out of and in the course of his employment notwithstanding that he was at the time of the accident acting in contravention of any statutory or other regulations applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if —

(i) the accident would have been deemed so to have arisen had such act not been done in contravention as aforesaid or without instructions from his employer, as the case may be; and

(ii) such act was done for the purposes of and in connection with the employer's trade or business."

It is clear that the plaintiff suffered a stroke in the course of his employment. The only question to be considered therefore is whether it was a "personal injury by accident arising out of" such employment. As I have already stated, the learned trial judge answered that question in the negative. This he clearly did in view of the opinion expressed by Dr. Christopher in his certificate dated 8th December, 1966 (Exhibit P1) that the plaintiff "suffered from a natural disease which had no relationship to his occupation". However, he was not then considering the question as to whether any compensation was payable under the Ordinance.

In his evidence in court the doctor said that he still stuck to that opinion with a slight modification. As regards this modification the doctor said:

"First, the doctor in Kuala Pilah did not mention that the stroke occurred during the course of his duties. So I thought

that this occurred in his natural state. I issued my medical certificate that this was a natural disease with no relationship to his occupation.

I knew he was employed as a bus conductor. I did ask him whether he was working at the time of the stroke and he said 'yes'. I issued a certificate.

A stroke could happen at any time even in his sleep."

In answer to questions put to him by the court the doctor went on to say:

"This is a stroke caused by clotting of blood in the brain. This could occur at any time unexpectedly. One must have arterial disease — disease in which arteries are thickened and lumen narrowing. This arterial disease is natural and it occurs gradually. Any form of exertion can cause occlusion of the artery.

To a person suffering from arterial disease any form of exertion can precipitate an acute occlusion so the part of the body distalled to this occlusion would suffer damage."

For his contention that the plaintiff is entitled to compensation under the Ordinance, his counsel relies, first, on the doctor's evidence in court that in the case of a person suffering from arterial disease any form of exertion can cause an occlusion of the artery resulting in a stroke, and, secondly, on the evidence of the plaintiff that shortly before he suffered a stroke he had been performing acts of physical exertion in unloading bags from the bus. As I said in *Golden Hope Rubber Estate Ltd.* v. *Muniammah & Ors*,[2] it is not easy to find a precise path among decided cases in order to arrive at a test as to when an injury suffered by a workman in the course of his employment may be said to be an injury by accident arising out of that employment. The dividing line between liability and non-liability is generally very thin. But I would adopt, with respect, the following test laid down by Romer L.J. in *Ormond* v. *C. D. Holmes & Co., Ltd.*:[3]

"If a man be incapacitated solely by reason of the fact that he is suffering from a disease, the incapacity is not due to a personal injury by accident. It may be possible, in certain cases, to attribute the contraction of the disease to an accident, that is to say, to some unlooked for mishap, or untoward event, and, when that can be done, and the disease results in an incapacity, it may rightly be said that the incapacity is one caused by that accident. But the disease itself is not an accident, in the popular and ordinary sense of that word. If a man should die suddenly of heart disease, without any contributing cause, no one would say that his death was accidental or due to an accident. In some cases, however, incapacity is caused by a disease in conjunction with a contributory cause. A man, for instance, may be suffering from a disease of the heart that sooner or later is bound to cause his death. His death, however, from the disease may be accelerated by some particular, though not necessarily an unusual, act of exertion. In those cases, the death or incapacity can properly be said to be caused by an accident, and, where the contributing cause is furnished by and in the course of the injured workman's employment, he is entitled to compensation under the Act."

I also find considerable support for that test from the decision in the case of *Darling Island Stevedoring and Lighterage Co., Ltd.*[4] in which Owen J. said:

"It is not to the point, in my opinion, to say that the respondent's pre-existing condition predisposed him to such an injury or that unless diagnosed and treated in time, that condition would sooner or later have produced such a collapse and resultant incapacity."

In my judgment the above test is most appropriate to the facts of the present case. The evidence of the plaintiff that he had to unload bags from the bus shortly before he had the stroke stood unchallenged. The doctor's evidence in court was that any form of exertion could cause an occlusion of an artery resulting in a stroke. His certificate to the effect that the stroke had no relationship to the plaintiff's occupation meant no more than that the nature of his occupation had nothing to do with the thickening of his arteries and the narrowing of the lumen. This arterial disease was no doubt natural and occurred gradually. But the fact that the plaintiff's condition predisposed him to a stroke was immaterial when such stroke took place in the course of and was caused by his work, unless it could be shown that the work itself did not contribute to or accelerate the stroke. It may well be true that the plaintiff was not subjected to unusual acts of exertion before he had the stroke. But can it be said that the contributing cause of the stroke was not furnished by and in the course of the plaintiff's employment? I do not think so. Had the learned trial judge given fuller consideration to the doctor's evidence in court, I have no doubt that he would have come to the same conclusion. I would therefore hold that the appellant is entitled to a compensation under the Ordinance and that it is within the competence of this court to make an award under section 41(2) of the Ordinance. The plaintiff's earnings were not less than $200 a month. As a result of the stroke the left side of his body was paralysed resulting in permanent total disablement. He is therefore entitled under section 8(b)(i) of the Ordinance to a compensation of $9,600. I would make an award accordingly. From the amount of that award must be deducted the respondents' costs in this court and the court below, which I would assess at $1,500. Appellant to have costs of this appeal assessed at $1,000.

Ong C.J.: I agree and would only add a few words. For authority that damages cannot be awarded for personal injury sustained by reason of a breach of statutory duty see *Tan Chye Choo* v. *Chong Kew Moi*,[5] a decision of this court affirmed on November 6, 1969 by the Privy Council.

Neither, in my view, can the claim succeed on the issue of negligence at common law since there is no relationship of cause and effect between the respondents' failure to grant their employee leave of absence for the day and the stroke he received. The damage was impossible to foresee: it certainly was too remote.

I am, however, satisfied that, on the facts, the appellant should be entitled to an award, under section 4(5) of the Workmen's Compensation Ordinance which provides that, for the purposes of the Ordinance, "an accident arising in the course of a workman's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment."

Ali F.J. concurred.

Order accordingly.

Solicitors: *Atma Singh Gill & Co.; Lovelace & Hastings.*